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No. 07-1506

In the Supreme Court of the United States

STEPHEN M. BELL,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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July 31, 2008

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QUESTION PRESENTED FOR REVIEW

Whether evidence has been "suppressed" under *Brady v. Maryland*[1] where the evidence the government has been charged with failing to disclose was available in a public record that the defendant had every reason to review.

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[1] 373 U.S. 83 (1963)

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The January 4, 2008, en banc opinion of the United States Court of Appeals for the Sixth Circuit, which affirmed the district court judgment denying habeas relief, is reported at 512 F.3d 223. (Pet.App. 1a) The August 25, 2006, panel opinion of the Sixth Circuit, which was subsequently vacated upon the grant of rehearing en banc, is reported at 460 F.3d 739. (Pet.App. 80a) The December 15, 2006, order of the Sixth Circuit granting rehearing en banc is unreported. (Pet.App. 140a) The order and memorandum opinion of the district court denying the petition for a writ of habeas corpus is unreported. (Pet.App. 58a)

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Petitioner was convicted in 1987 of the shooting deaths of Herman Harrison Wallace and his wife, Jean Lynn Wallace, on September 6, 1986. He was sentenced to life imprisonment. The opinion of the Tennessee Court of Criminal Appeals on petitioner's direct appeal accurately summarizes the evidence presented at trial:

> The victims, Herman Harrison Wallace, a/k/a Mad Dog, and his wife, Jean Lynn Wallace, were street people who camped under the bridges along the Cumberland River. The

defendant, Michael Bell, a/k/a Monk, a street person, camped between the Wallaces and Nashville's Riverfront Park.

Ronald Harrington, a street person, met the defendant on the railroad tracks near the camp sites on September 6, at approximately 3:00 p.m. Defendant was shirtless, wearing Levi's, a pair of shoes or boots and had a gun in his hand. Chained to his belt, was a billfold similar to that carried by truck drivers. The gun was either a .32 or .38 caliber revolver. Defendant appeared to be under the influence and stated that he had been "coking". During this exchange the defendant asked Mr. and Mrs. Harrington to take care of his dog if anything happened to him.

Edward Stansbury, an admitted alcoholic, testified that he spent the night of September 5, 1986, with friends on the river. The next morning he left but returned to the camp of Gary Hedges in the afternoon. At approximately 4:30 p.m. they noticed a man come up a path with a shiny black dog on a leash. The leash was a choker chain with a leather belt. When the man got to within twenty feet he spoke identifying himself as "Monk" and inquiring if "Mad Dog" and Jean were home. He walked down to the Wallaces' tent and entered. Up to this point he, Stansbury, had no reason to commit to memory the man's clothing or facial features.

As Stansbury and Hedges continued to sit they heard the sounds of dogs fighting and people arguing in the Wallaces' camp, then they heard a muffled shot. Jean Wallace ran out of the tent screaming "He has killed my dog, he has killed my dog". She turned and re-entered the tent. Stansbury heard a distinctive gun shot and saw Jean Wallace backing out of the tent. As she cleared the entrance she fell and there were two more shots. He was sure he had seen the man fire the last shot. The man had been right behind Mrs. Wallace at the entrance. The man left the tent and left the scene. As the man was leaving he attempted to reload his pistol.

. . .

At a line-up conducted near the crime scene in the fading evening light, Stansbury was hesitant to identify the man in the number two spot. He was certain as to the man's jeans and nearby dog. While testifying he said he was still confused about the man's beard; he thought the culprit had short dark hair, but everything else about the number two man, the defendant, "fit to a tee".

Robert Moore, a Metropolitan Police Department homicide officer, arrived at the Wallaces' camp. He viewed the body of Mrs. Wallace and was directed to four shell casings that were lying on the ground. The soil in the area was fairly loose and the shell casings, covered with a chalky gray substance, were on top of the soil. Upon closer examination he was able to detect the smell of gun powder.

Officer Moore was advised that Mr. Wallace had been moved to General Hospital and although he appeared to have been shot as many as three times, only one slug had been found at the hospital. The officers at the crime scene made an extensive search and were able to recover a slug from the bloody mattress within the tent where Mr. Wallace had lain when shot.

. . .

Officer Mark Wynn and two other officers responded to a call that a man fitting the description of the suspect was believed to be in the area of Fessler's Lane and Hermitage Avenue. They observed the suspect sitting on the curb and drinking a beer. He had a dog with him. He was taken in custody and found to have six unspent .38 caliber Special Winchester 158 grain bullets in his pants pockets, but no weapon was found. He was concerned about the dog so the officers agreed to transport the dog to the place of the line-up. (A picture of the dog wearing the choke chain and belt leash was shown the jury.)

Sergeant Tommy Jacobs testified that shortly after 5:30 p.m., September 6, 1986, he visited the camp site of the defendant and recovered eleven spent .38 caliber shell casings and a Winchester ammunition box that were lying on the ground. A holster was also recovered at the camp site. Later at the police station Sergeant Jacobs read the defendant his Miranda rights. When told he would be charged

with murder, the defendant responded that he had not shot anyone, had not shot a gun and had never shot a gun.

Officer Darryl Ryan performed a nitric acid test on the defendant's hands. The swabs were sent to the crime laboratory.

Officer Archie Spain was sent to General Hospital. He took possession of a .38 caliber slug that was laying beside Mr. Wallace's body in the emergency room.

The State introduced testimony from three laboratory technicians. The first technician had examined the defendant's clothing for blood stains but found none. The second technician, a criminalist, had examined the swabs from the defendant's hands for gunshot residue. This technician testified that "antimonium, barium and lead indicative of gunshot residue was found in significant concentrations on exhibit 5, hand swabs. These results indicate that the subject could have fired or handled a gun."

The third technician was a firearm examiner. He identified the two lead slugs filed earlier as exhibits as being fired from the same firearm. He had disassembled one of the live cartridges taken from the defendant's pockets to compare the lead to the other lead slugs. He was of the opinion the three were from the same manufacturer. The eleven spent shells taken from defendant's camp site were compared with the four spent shells recovered at the victims'

> camp site. Based upon his microscopic examination he was of the opinion they all had been fired from the same firearm.

State v. Stephen Michael Bell, 1989 WL 86583 (Tenn. Crim. App. Aug. 4, 1989).

Although not reflected in the state court's summary of the evidence, William Davenport, a state prisoner then serving a sentence, testified that he shared a cell with petitioner at the Nashville Jail in September 1986 when Davenport was brought in to face pending charges.[2] (C.A.J.App. 256) Davenport explained that, in the course of a conversation, petitioner talked to him about the double murder with which he had been charged, telling Davenport why he had killed each of the two victims. (C.A.J.App. 256-257)

Ross Alderman, petitioner's trial counsel, filed a discovery request in petitioner's case, in which he requested exculpatory material relating to any agreement between the prosecution and any witness expected to testify at trial. (C.A.J.App. 439-441) Alderman testified in federal court that he could not recall whether he obtained any information from the prosecution in response to this discovery request. (C.A.J.App. 443) He was unsure whether he knew specifically that Davenport had been charged with concealing stolen property in August 1986, although he admitted that he "probably knew" why Davenport was in custody at the time of petitioner's trial. (C.A.J.App.

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[2] Petitioner was facing the double murder charges in this case at the time.

443) He also testified that he "may well have known" Davenport received concurrent sentences for his 1986 Davidson County convictions, but he could not specifically recall. (C.A.J.App. 444) Alderman noted that he did not get any information from the prosecution regarding Davenport's parole eligibility or his convictions and charges but that, if he had obtained this information, he would have used it to impeach Davenport's testimony. (C.A.J.App. 443, 446-447, 453)

On cross-examination, Alderman admitted he argued to the jury that Davenport's motivation for testifying against the petitioner was that he had an upcoming parole hearing and that, if Davenport helped convict the petitioner, the parole board might "cut him some slack." (C.A.J.App. 460) Alderman also stated that Davenport was cross-examined about his five prior felony convictions and the fact that he had an upcoming parole hearing. (C.A.J.App. 460-462)

Ronald Miller, the district attorney who prosecuted the petitioner,[3] testified that, sometime prior to trial, Davenport contacted the District Attorney's Office by letter. (C.A.J.App. 476) As a result of this letter, Miller met with Davenport twice before the petitioner's trial. (C.A.J.App. 476-477) Miller unequivocally stated that he did not promise Davenport anything in exchange for his testimony against the petitioner. (C.A.J.App. 471, 474)

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[3] Miller has since left the district attorney's office. He is now an administrative law judge for the Social Security Administration. (C.A.J.App. 470)

Miller admitted that, three weeks after the petitioner's trial, he wrote a letter to the parole board asking that Davenport be released at the earliest eligible date. (C.A.J.App. 480-481) Miller explained that he wrote the letter because Davenport testified against the petitioner, who was dangerous, and he was concerned that Davenport would be labeled as a snitch. Miller noted that he did not promise Davenport he would write the letter and that he could not have personally granted the petitioner parole even if he wanted to. (C.A.J.App. 475-476)

Miller also stated in that letter that the prosecution would not have had a strong case against the petitioner without Davenport's testimony. (C.A.J.App. 484) Miller explained that Davenport's testimony was helpful because it established the petitioner's motive for the killings and what actually occurred at the time of the shooting. He noted, however, that the case against the petitioner would have gone forward even without Davenport's testimony and that he believed he would have obtained a conviction without this testimony. (C.A.J.App. 483)

After petitioner's conviction was affirmed on direct appeal and he had been denied state post-conviction relief, petitioner sought federal habeas corpus relief, claiming, *inter alia*, that the state had unconstitutionally withheld impeachment evidence relating to William Davenport. Specifically, petitioner claimed that the state had failed to disclose evidence of the prosecutor's pre-trial meeting with Davenport, the disposition of some pending charges against Davenport, and the letter to the parole board, all of which, petitioner asserted, showed that the state had

failed to disclose an agreement it had made to provide Davenport with benefits in exchange for his testimony. The district court denied the claim; it found that the prosecutor's letter to the parole board could not have been disclosed because the decision to write it had been made after trial, and it concluded that the pre-trial meeting with Davenport was not material in light of the evidence that was presented at trial. (Pet.App. 78a)

A divided, three-judge panel of the Sixth Circuit reversed the judgment (Pet.App. 80a), but rehearing en banc was subsequently granted, and this opinion was vacated. (Pet.App. 140a) In a split, en banc decision, the Sixth Circuit affirmed the denial of habeas relief. The eight-member majority held that there was no *Brady* violation. While the court acknowledged that both an express and tacit agreement between the government and a witness must be disclosed, it concluded that petitioner had not adequately demonstrated the existence of any such agreement between Davenport and the prosecution. (Pet.App. 20a) The court further held that there was no *Brady* violation in the government's failure to disclose Davenport's sentencing records, because petitioner knew that Davenport had pending charges and the sentencing records were publicly available. (Pet.App. 21a) Lastly, while the court concluded that the notes of the prosecutor's pre-trial meeting with Davenport should have been disclosed, there was no *Brady* violation because they were not material in light of the other evidence and argument presented at trial. (Pet.App. 26a) Petitioner now seeks this Court's review.

REASONS FOR DENYING REVIEW

I. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

In support of his bid for certiorari, petitioner asserts that the decision of the Sixth Circuit with regard to the allegedly withheld sentencing records "cannot be reconciled with this Court's decisions in *Strickler* [*v. Greene*, 527 U.S. 263 (1999),] and in *Banks* [*v. Dretke*, 540 U.S. 668 (2004)]." (Pet. 13) But this is simply not so. Indeed, the Sixth Circuit expressly considered, and distinguished, both of these decisions. The basis for the holding of the Sixth Circuit in this case is neither akin to the arguments advanced by the government in *Strickler* and *Banks*, nor inconsistent with this Court's reasons for rejecting those arguments. And the reasonable reliance placed by the defendants in those cases on affirmative representations made by the government does not exist in this case.

In *Strickler*, the habeas petitioner alleged that the state had violated *Brady* by withholding impeaching evidence relating to the state's main witness, which consisted of police interview notes and letters sent to the police by the witness. 527 U.S. at 273. Noting that the petitioner's claim was procedurally defaulted, the Court proceeded to determine whether that default was excused by an adequate showing of cause and prejudice. The Court went on to hold that the petitioner had established cause for failing to raise his *Brady* claim because (1) the prosecution suppressed the evidence; (2) the petitioner reasonably relied on the

prosecution's open file policy as fulfilling its duty to disclose under *Brady*; and (3) the prosecution affirmatively confirmed such reliance during state habeas proceedings. *Strickler*, 527 U.S. at 289.

In *Banks*, the habeas petitioner likewise alleged that the state had violated *Brady* by withholding impeaching evidence relating to the state's main witnesses — information that one witness was a paid police informant and a transcript showing that the other witness' testimony had been previously coached. 540 U.S. at 675. While the petitioner had presented the claim in state court, he nevertheless needed to demonstrate cause for his failure to develop the facts of that claim in state court in order to secure an evidentiary hearing in federal court. Noting that its determination of this "cause" question was informed by *Strickler*, the Court concluded that "[t]his case is congruent with *Strickler* in all three respects." First, the evidence and information was suppressed; second, the petitioner reasonably relied on the prosecution's representation that it would disclose all *Brady* material; and third, the state "confirmed" such reliance in state habeas proceedings. 540 U.S. at 693.

In both cases, with respect to the "reasonable reliance" factor, the Court rejected the state's argument that the petitioner could have obtained the evidence by investigating himself and that, by failing to do so, he failed to exercise due diligence in pursuing his claim. In *Strickler*, the state asserted that the petitioner must have known about the witness' multiple police interviews and that diligent counsel could have obtained an order from the state court to produce the police files. 527 U.S. at 284-285. In

Banks, the state asserted that the petitioner failed to locate the witness and failed to interview the investigating officers in order to ascertain his true status. In both instances, the Court found the arguments unpersuasive in light of the representations that had been made by the state. 540 U.S. at 694-695. "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks*, 540 U.S. at 695; *see Strickler*, 527 U.S. at 285-287.

The decision of the Sixth Circuit in this case differs markedly in two material respects — both noted by the Sixth Circuit majority.[4] First, "[n]either [*Strickler* nor *Banks*] involves information remotely similar to the public sentencing records not given to the defense in this case. Rather, both involve information known to investigating officers that defendants had no reason to know about and that could not have been discovered by defendants without an extensive and possibly fruitless investigation." (Pet.App. 22a) In other words, both cases involved information known only by the prosecution that was hidden or concealed from the defendant. In contrast, the information at issue in this

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[4] These two differences are in addition to the obvious difference, namely, that both *Strickler* and *Banks* involved the cause and prejudice analysis for a *Brady* claim, while the Sixth Circuit decision involved a merits analysis of a *Brady* claim. But because the cause analysis "corresponds" to the suppression analysis, *Banks*, 540 U.S. at 691, and because this Court has intimated that suppression alone *might* suffice to establish cause, *id.*, 540 U.S. at 693 n.13, respondent dispenses with any discussion of this distinction.

case "was a matter of public record" — in the very courthouse in which petitioner's own case was being prosecuted (C.A.J.App. 490-497); it was thus readily available to petitioner without any investigation whatsoever. *See Matthews v. Ishee*, 486 F.3d 883, 890 (6th Cir.), *cert. denied*, 128 S.Ct. 613 (2007) (contrasting case where allegedly withheld impeachment information was public information "with those cases when the government has sole possession of investigative notes or memoranda").[5] *See also United States v. Agurs*, 427 U.S. 97, 109 (1976) (prosecutors are "under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses") (quoting *In re Imbler*, 387 P.2d 6, 14 (Cal. 1963)). With petitioner having had ready access to this information prior to trial, it cannot be said that the state engaged in the "hide and seek" game-playing condemned by this Court in *Banks*. *See* 540 U.S. at 696.

Second, given the kind of evidence involved in both *Strickler* and *Banks* and the lack of any reason for the defendants in those cases to have known about its existence, this Court "readily concluded that Strickler and Banks had shown cause . . . because they had reasonably relied on the prosecutor's open file policy and assertions during state proceedings that everything known to the government had been disclosed." (Pet.App. 23a) In contrast, not only were the sentencing records in this case available to

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[5] The question on which this Court denied certiorari in *Matthews* was nearly identical to the one presented in this case. *See Matthews v. Ishee*, No. 07-5741 (U.S.).

petitioner, but "because Davenport's testimony derived from statements [petitioner] made to him while they were in jail together, [petitioner] easily could have pursued any pending charges against Davenport and their disposition." (Pet.App. 21a) "[I]n this case the known fact of Davenport's incarceration strongly suggested that further inquiry was in order, whether or not the prosecutor said he had turned over all the discoverable evidence in his file." (Pet.App. 24a) *See Matthews*, 486 F.3d at 891 ("Matthews's failure to check the public records after being put on notice was his own failure . . . ."). *Cf. United States v. Pelullo*, 399 F.3d 197, 213 (3d Cir. 2005) ("[D]efense counsel's knowledge of, and access to, evidence may be nullified when a prosecutor misleads the defense into believing the evidence will not be favorable to the defendant.") Indeed, petitioner not only knew that Davenport was incarcerated, he "probably knew why." (C.A.J.App. 444)[6] As the Sixth Circuit concluded, "[t]he absence of

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[6] At the federal evidentiary hearing, petitioner's trial counsel testified, "I knew he [Davenport] was in custody, so I probably knew why he was in custody." When specifically asked whether he knew about Davenport's concurrent sentences, he stated, "I may well have known what his sentence was when he testified in 1987 . . . ." When asked whether he knew that Davenport had charges "nolled," counsel stated, "I don't recall whether I did or not." (C.A.J.App. 444) The trial record supports the conclusion that counsel did know about Davenport's concurrent sentences: the prior convictions on which Davenport was cross-examined at trial included a 1986 conviction in Davidson County for concealing stolen property, and the first indictment on which Davenport received a concurrent sentence in November 1986 was for concealing stolen property. (C.A.J.App. 260, 492-494)

reasonable reliance distinguishes this case from *Strickler* and *Banks*." (Pet.App. 25a)

Moreover, petitioner's trial counsel expressly disavowed reliance on the representation of the prosecutor for production of the witness' sentencing records. When asked at the federal evidentiary hearing whether he had "any reason to believe that the pending charges and convictions wouldn't be turned over to [him]," counsel stated, "It would not have surprised me if the DA's position was that *the local record was accessible to me. . . .* " (C.A.J.App. 445) (emphasis added) Not only, therefore, did petitioner not rely on the state's representation for production of the information he alleges was withheld, but his own counsel admitted that it was reasonable for the prosecution to expect that petitioner would obtain this information on his own. There was not only no reasonable reliance in this case; there was no reliance whatsoever.

II. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

Petitioner also asserts that there is a vast "eleven-circuit split" of authority on the question presented in this case and that this is yet another reason for the Court to review the Sixth Circuit decision. But petitioner's assertion suffers from two fundamental flaws. First, he vastly overstates the dimension of any such split. Second, to the extent there exists a difference of opinion among the circuits, it is not on the question presented by this case.

A. The Claimed "Eleven-Circuit Split" Is Illusory.

Petitioner says that the holding of the Sixth Circuit in this case is followed by the First, Second, Third, Seventh, Eighth, and Eleventh Circuits. Be that as it may,[7] petitioner's corresponding assertion that the Fourth, Fifth, Ninth, and Tenth Circuits have "squarely held" to the contrary is erroneous. Petitioner relies for his claim on unpublished decisions and on dicta; he also ignores published decisions that directly refute his contention. He is wrong, therefore, to say that there is a "mature and entrenched" conflict (Pet. 27); he is also wrong to say that he "would have received habeas relief if his case had arisen in at least four . . . circuits." (Pet. 13)

Petitioner bases his assertion that the Sixth Circuit decision conflicts with the law in the Fourth Circuit on the unpublished decision in *Walker v. Kelly*, 195 Fed.Appx. 169 (4th Cir. 2006). But petitioner himself admits that published Fourth Circuit authority is in line with the Sixth Circuit. *See, e.g., Barnes v. Thompson*, 58 F.3d 971, 975 (4th Cir. 1995); *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990) (*Brady* rule does not apply if the evidence is available to the defendant from other sources). *See also Lovitt v.*

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[7] The cases petitioner cites from these circuits are certainly not inconsistent with the decision of the Sixth Circuit in this case, but only three — *United States v. Rodriguez*, 162 F.3d 135 (1st Cir. 1998); *United States v. Payne*, 63 F.3d 1200 (2d Cir. 1995); and *Lugo v. Munoz*, 682 F.2d 7, 9 (1st Cir. 1982) — can be said to have implicated the fact that the allegedly withheld evidence was publicly available.

True, 403 F.3d 171, 184 (4th Cir. 2005) (quoting *Wilson* with approval). And while petitioner points to the decision in *Walker* as evidence that the Fourth Circuit "used to apply the Sixth Circuit's rule, but no longer does" (Pet. 23), less than a month before the unpublished decision in *Walker*, a different panel of the Fourth Circuit issued another unpublished decision in which it found no merit to a *Brady* claim for failure to turn over DMV record information, "which was available to the defendant in a place where a reasonable defendant would have looked." *Sanders v. Johnson*, 191 Fed.Appx. 240, 244 n.2 (4th Cir. 2006), *cert. denied*, 127 S.Ct. 2433 (2007) (citing *Wilson* with approval).

Petitioner's statement that "[t]he Fifth Circuit also agrees that the defendant's own knowledge is irrelevant in *Brady* cases" (Pet. 26) is based merely on dicta and unpublished authority; it also ignores published authority to the contrary. *Johnson v. Dretke*, 394 F.3d 332 (5th Cir. 2004), the one published case on which petitioner relies, held only that the habeas petitioner was entitled to a certificate of appealability on his claim that he had satisfied the gateway requirements under 28 U.S.C. §2244(b)(2)(B)(i) for filing a successive habeas petition. It did not involve the merits of a *Brady* claim or even of the underlying cause analysis under §2244(b).[8]

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[8] *Mathis v. Dretke*, 124 Fed.Appx. 865 (5th Cir. 2005), the unpublished decision on which petitioner relies, likewise involved only the determination whether to grant a COA.

Moreover, petitioner overlooks subsequent authority that directly refutes his statement. In *United States v. Infante*, 404 F.3d 376 (5th Cir. 2005),[9] the Fifth Circuit held that there was no *Brady* violation for the government's failure to disclose impeachment information about a witness, because the information "was a matter of public record." 404 F.3d at 387. "*Brady* rights are not denied where the information was fully available to the defendant and his reason for not obtaining and presenting such information was his lack of reasonable diligence." *Id.*, 404 F.3d at 386 (quoting *United States v. Dean*, 722 F.2d 92, 95 (5th Cir. 1983)). *See United States v. Valles-Zamora*, 252 Fed.Appx. 701, 703 (5th Cir. 2007), *cert. denied*, 128 S.Ct. 1455 (2008) (citing *Infante* with approval).

Petitioner's claim that "[t]he Tenth Circuit also agrees [that the defendant's own knowledge is irrelevant]" is at best dubious. In *United States v. Quintanilla*, 193 F.3d 1139 (10th Cir. 1999), which petitioner cites, the Tenth Circuit actually rejected a *Brady* claim because the potentially exculpatory evidence "was known to [the] defendant well before trial." 193 F.3d at 1149. While the court did cite *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995), for the proposition that "whether a defendant knew or should have known of the existence of potentially exculpatory evidence is irrelevant to the prosecution's obligation to disclose the information," it went on nevertheless to say that "a defendant's independent awareness of the exculpatory evidence is critical in

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[9] *Infante* was decided on March 21, 2005 — ten days after *Mathis*.

determining whether a *Brady* violation has occurred." *Quintanilla*, 193 F.3d at 1149.[10] "If a defendant already has a particular piece of evidence, the prosecution's disclosure of that evidence is considered cumulative, rendering the suppressed evidence immaterial." *Id.*[11] But this is just another way of saying that there is no *Brady* violation because disclosure by the state was *unnecessary*, *i.e.*, the evidence was not concealed, hidden, or "suppressed." *See United States v. Hernandez-Muniz*, 170 F.3d 1007, 1010 (10th Cir. 1999) ("There could be no suppression by the state of evidence already known by and available to [defendant] prior to trial.") (quoting *DeBerry v. Wolff*, 513 F.2d 1336, 1340 (8th Cir. 1975)). *See also Spears v. Mullin*, 343 F.3d 1215, 1256 (10th Cir. 2003) (citing *Hernandez-Muniz* with approval).

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[10] The Sixth Circuit majority in this case similarly observed that "the government's withholding of evidence does not necessarily mean that it has suppressed the evidence for purposes of ascertaining whether a *Brady* violation has occurred. And whether a *Brady* violation is ultimately found is not determinative of the extent of the prosecutor's broad duty to disclose exculpatory evidence." (Pet.App. 23a-24a n.7)

[11] Petitioner dismisses the significance of this statement as nothing but "an entirely reasonable observation" (Pet. 26 n.5), but one need only make the "entirely reasonable" addition of the words "access to" after the fifth word of the sentence in order to bring it in line with the decision of the Sixth Circuit in this case.

B. Any Split That Exists Among the Circuits Is on a Question Other Than the One Presented in this Case.

Decisions in the Fourth, Fifth, and Tenth Circuits being more in accord than in conflict with the decision of the Sixth Circuit in this case, petitioner is left only with his claim of a conflict with the Ninth Circuit. In support of this claim, he cites the decision in *Gantt v. Roe*, 389 F.3d 908 (9th Cir 2004). While *Gantt* does appear to set forth the state of the law in the Ninth Circuit, it nevertheless can be distinguished from the Sixth Circuit decision in this case — for the very same reasons that this Court's decisions in *Strickler* and *Banks* can be so distinguished. Consequently, there is no conflict between the Sixth and Ninth Circuits — at least not on the question presented by this case: whether evidence available to the defendant in a public record that he had every reason to look at has been "suppressed" under *Brady*.[12]

Like *Strickler* and *Banks*, *Gantt* did not involve information even "remotely similar to the public sentencing records not given to the defense in this case." (Pet.App. 22a) In *Gantt* the prosecution failed to disclose information it had obtained through the police investigation regarding the significance of a piece of evidence — a matchbook found on the

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[12] Petitioner says that the Sixth Circuit "has applied its rule in two additional cases." But the decisions in *Johnson v. Bell*, 525 F.3d 466, 477 n.8 (6th Cir. 2008), and *Lewis v. Tennessee*, 2008 WL 698935 (6th Cir. Mar. 14, 2008), demonstrate that the Sixth Circuit's "rule" is limited to evidence that is *publicly available*.

petitioner's person — that it relied upon to prove identity at trial. *Gantt*, 389 F.3d at 910-911. And like *Strickler* and *Banks*, therefore, *Gantt* involved "information known to investigating officers that defendants had no reason to know about and that could not have been discovered by defendants without an extensive and possibly fruitless investigation." (Pet.App. 22a) *See Gantt*, 389 F.3d at 911 ("prosecution in a criminal case has a duty to disclose all material evidence *in its possession* that is favorable to the accused") (emphasis added).

Moreover, in *Gantt* the prosecution had affirmatively represented that it was keeping the defense apprised of developments in the investigation. *Gantt*, 389 F.3d at 913. "Though defense counsel could have conducted his own investigation, he was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation." *Id.* The state made no such representation in this case. Furthermore, as discussed above, the defense simply did not rely on the representation the state did make for production of the witness' sentencing records; even if it had, any such reliance would not have been reasonable given the public availability of the evidence and all the reasons why petitioner knew to look at it.[13]

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[13] The lack of actual reliance in this case likewise undermines petitioner's attempt to present a circuit split on the basis of decisions hinging on such reliance. (Pet. 28-31)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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